IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

DARAMIC, LLC Plaintiff v. MICROPOROUS, LLC Defendant	))))))))))	**COMPLAINT** **JURY TRIAL DEMANDED**

Plaintiff Daramic, LLC ("Plaintiff" or "Daramic") brings this action pursuant to 15 U.S.C. §§ 1114 and 1125, North Carolina common law, and North Carolina General Statutes § 75 *et seq.*, seeking injunctive relief and damages against Defendant Microporous, LLC ("Defendant" or "Microporous"), for trademark infringement, false advertising, unfair competition, and unfair and deceptive trade practices.

PARTIES

1. Plaintiff is a limited liability company organized and existing under the laws of Delaware and has its principal place of business at 11430 N. Community House Road, Suite 350, Charlotte, North Carolina 28277.

2. Defendant is a limited liability company organized and existing under the laws of Delaware and has its principal place of business at 596 Industrial Park Rd., Piney Flats, Tennessee 37686.

JURISDICTION AND VENUE

3. This Court has subject matter jurisdiction over this action pursuant to 15 U.S.C. § 1121 and 28 U.S.C. §§ 1331, 1338(a) and (b), and 1367.

4. This Court has personal jurisdiction over Defendant consistent with the principles underlying the U.S. Constitution and N.C. Gen. Stat. § 1-75.4.

5. On information and belief, Defendant has regularly and intentionally conducted business in this State and District and is subject to personal jurisdiction in this State and District by virtue of its contacts here.

6. On information and belief, Defendant has conducted business in this State and District by, *inter alia*, offering for sale, selling, and distributing products within this State and District.

7. Defendant advertises that it supplies an extensive customer base located across 23 countries and five continents.

8. On information and belief, Defendant's products are offered for sale to customers residing in this State and District and have been sold to customers in this State and District.

9. On information and belief, Defendant has voluntarily and purposefully placed its products into the stream of commerce with the expectation that they will be purchased and/or used in this State and District.

10. Defendant is marketing and advertising its battery separator products in this State and District.

11. The harm caused by Defendant's unlawful activities, as set forth herein, is being experienced by Plaintiff in this State and District.

12. Venue is proper in the United States District Court for the Western District of North Carolina pursuant to 28 U.S.C. §§ 1391(b).

FACTUAL BACKGROUND

Plaintiff's Products and Trademark Rights

13. For over 80 years, Plaintiff has led the way in developing new and innovative technology for the lead acid battery market. Plaintiff is a global leader in supplying separator solutions for use in starting, deep-cycling and stand-by power battery applications. Plaintiff's battery separators can be found in Flooded, Gel and AGM battery types used in applications such as: automotive starting, stationary equipment, motive power and deep-cycle lead acid battery applications.

14. Plaintiff is the owner of U.S. Trademark Registration No. 925,419 for the mark DARAMIC, directed to the following goods: "battery separators."

15. U.S. Trademark Registration No. 925,419 issued on December 14, 1971, from an application filed on October 30, 1970, and claims a date of first use by Plaintiff of the DARAMIC mark as September 9, 1966.

16. A true and correct copy of U.S. Trademark Registration No. 925,419 for the mark DARAMIC is attached hereto as Exhibit A.

17. Plaintiff is the owner of U.S. Trademark Registration No. 2,190,924 for the mark DARAMIC & Design, directed to the following goods: "battery separators."

18. U.S. Trademark Registration No. 2,190,924 issued on September 22, 1998, from an application filed on August 25, 1997, and claims a date of first use by Plaintiff of the DARAMIC & Design mark as June 1995.

19. A true and correct copy of U.S. Trademark Registration No. 2,190,924 for the mark DARAMIC & Design is attached hereto as Exhibit B.

20. Plaintiff is the owner of U.S. Trademark Registration No. 2,190,928 for the mark DARAMIC & Design, directed to the following goods: "battery separators."

21. U.S. Trademark Registration No. 2,190,928 issued on September 22, 1998, from an application filed on August 25, 1997, and claims a date of first use by Plaintiff of the DARAMIC & Design mark as June 1995.

22. A true and correct copy of U.S. Trademark Registration No. 2,190,928 for the mark DARAMIC & Design is attached hereto as Exhibit C.

23. Plaintiff is the owner of U.S. Trademark Application Serial No. 87166288, for the mark DARAMIC HP, directed to the following goods: "lead acid battery separators."

24. U.S. Trademark Application Serial No. 87166288 was filed on September 9, 2016, and claims a date of first use by Plaintiff for the DARAMIC HP mark at least as early as December 31, 1997.

25. Plaintiff is the owner of U.S. Trademark Application Serial No. 87109959, for the mark DARAMIC HD, directed to the following goods: "battery separators."

26. U.S. Trademark Application Serial No. 87109959 was filed on July 20, 2016, and claims a date of first use by Plaintiff for the DARAMIC HD mark at least as early as December 31, 2002.

27. Plaintiff is the owner of U.S. Trademark Application Serial No. 87166443, for the mark DARAMIC IND CL, directed to the following goods: "battery separators."

28. U.S. Trademark Application Serial No. 87166443 was filed on September 9, 2016, and claims a date of first use by Plaintiff for the DARAMIC IND CL mark at least as early as March 31, 2001.

29. Plaintiff is the owner of U.S. Trademark Registration No. 2,778,406 for the mark DURALIFE, directed to the following goods: "battery separator membranes for use in lead acid batteries."

30. U.S. Trademark Registration No. 2,778,406 issued on October 28, 2003, from an application filed on December 13, 2001, and claims a date of first use by Plaintiff of the DURALIFE mark as April 22, 2003.

31. A true and correct copy of U.S. Trademark Registration No. 2,778,406 for the mark DURALIFE is attached hereto as Exhibit D.

32. Plaintiff is the owner of the mark DARAMIC CL for use in connection with battery separators.

33. Plaintiff's products are recognized and referred to by customers by the designations CL, HD and HP, thus showing that these designations act as source identifiers for Plaintiff's battery separators and have secondary meaning in the minds of these consumers.

34. Plaintiff has trademark rights in its CL, HD and HP designations for use with battery separators.

35. The DARAMIC, DARAMIC HP, DARAMIC HD, DARAMIC CL, CL, HD, and HP marks are collectively referred to herein as the "DARAMIC Marks."

36. Plaintiff has the exclusive right to use the DARAMIC Marks in connection with the marketing and sale of the battery separator products described herein, and to exclude the use of the same or similar marks in connection with the same or similar goods, as such use is likely to cause confusion, mislead, and create a false impression with customers and consumers.

37. The DARAMIC Marks are inherently distinctive and/or have acquired distinctiveness as applied to Plaintiff's battery separator products.

38. Customers and consumers of battery separator products from Plaintiff associate the DARAMIC Marks with a single source.

39. The DARAMIC Marks are source identifiers for Plaintiff's battery separator products.

40. Plaintiff has prior rights in the DARAMIC Marks in connection with battery separators.

41. Plaintiff has expended significant resources in advertising and promoting battery separator products bearing the DARAMIC Marks throughout the United States.

42. When members of the relevant public see or hear the DARAMIC Marks as used in connection with battery separators, they believe that products bearing one or more of those marks emanate from a single source, namely Plaintiff.

43. The DARAMIC Marks have acquired substantial goodwill and a strong association with Plaintiff in the minds of relevant consumers nationwide.

44. Defendant has acknowledged that the DARAMIC Marks are trademarks of Plaintiff.

Defendant's Unlawful Activities

45. Defendant touts itself as "a leading developer, manufacturer and marketer of high-performance rubber, polyethylene (PE), and hybrid battery separators for flooded lead-acid batteries."

46. In referring to its battery separator business, Defendant commercially advertises to the public that "we continue to offer the broadest line of battery separators in the world" and "[n]o other battery separator manufacturer in the world offers as extensive a product line for

almost every battery application." Printouts from Defendant's website showing these promotional statements are attached as Exhibit E.

47. Plaintiff and Defendant compete for sales of battery separators.

48. Defendant does not offer the broadest line of battery separators in the world.

49. Plaintiff offers a broader line of battery separators as compared to Defendant.

50. Defendant knows or should know that it does not offer the broadest line of battery separators in the world and that Plaintiff offers a broader line of battery separators as compared to Defendant.

51. Plaintiff, among possibly other battery separator manufacturers in the world, offers as extensive a product line for almost every battery application as Defendant.

52. Defendant is using the DARAMIC Marks in connection with sales of competing battery separators.

53. Defendant's website at www.microporous.net, shows that the DARAMIC Marks are being used by Defendant. For example, as shown on the printout at Exhibit F, Defendant is using the DARAMIC Marks in conjunction with its sale of products Defendant refers to as "DuroForce Ultra," "DuroForce CL," and "DuroForce HD."

54. Defendant refers to its DuroForce Ultra battery separators as "previously sold as Daramic HP."

55. Defendant refers to its DuroForce CL battery separators as "previously sold as Daramic CL."

56. Defendant refers to its DuroForce HD battery separators as "previously sold as Daramic HD."

57. Defendant's "previously sold as" statements appear on Google search results when searching for Plaintiff's battery separator products. Exemplary search results are shown at Exhibit G.

58. Defendant does not sell, and never has sold, Plaintiff's DARAMIC HP battery separators.

59. Defendant does not sell, and never has sold, Plaintiff's DARAMIC CL battery separators.

60. Defendant does not sell, and never has sold, Plaintiff's DARAMIC HD battery separators.

61. Defendant knows or should know that it has never sold Plaintiff's DARAMIC HP, DARAMIC CL, and DARAMIC HD battery separators.

62. Defendant knows or should know that its DuroForce Ultra battery separators are not the same as Plaintiff's DARAMIC HP battery separators and that Plaintiff continues to sell DARAMIC HP battery separators.

63. Defendant knows or should know that its DuroForce CL battery separators are not the same as Plaintiff's DARAMIC CL battery separators and that Plaintiff continues to sell DARAMIC CL battery separators.

64. Defendant knows or should know that its DuroForce HD battery separators are not the same as Plaintiff's DARAMIC HD battery separators and that Plaintiff continues to sell DARAMIC HD battery separators.

65. Both Plaintiff's and Defendant's battery separators are sold to the same class of consumers through the same channels of trade.

66. Defendant knows or should know that Plaintiff does not control the quality, performance, composition or production of Defendant's DuroForce Ultra, DuroForce CL and DuroForce HD battery separators.

67. Defendant's use of the DARAMIC Marks as alleged herein is likely to cause confusion among consumers as to the affiliation, connection, association, origin, sponsorship, or approval of Defendant's battery separators with or by Plaintiff.

68. Defendant's use of the DARAMIC Marks as alleged herein is likely to cause confusion among consumers as to Plaintiff's control of quality, performance, composition, structure, or production of Defendant's battery separators.

69. Defendant's actions are not permitted by a 2013 Shared IP License Agreement between the parties.

70. Defendant knew of Plaintiff's trademark rights before it began marketing products similar to those offered by Plaintiff using the DARAMIC Marks.

71. Defendant's actions have been intentional, willful, malicious, and in complete disregard of Plaintiff's rights.

72. Defendant's infringing activities have caused and will continue to cause damage to Plaintiff by, *inter alia*, harming Plaintiff's sales, Plaintiff's goodwill, and the reputation of Plaintiff and its battery separators.

73. If Defendant's conduct is not enjoined, Plaintiff will suffer irreparable harm and damage in an amount not yet determined.

74. Defendant's unlawful conduct has irreparably harmed Plaintiff, and unless enjoined, will continue to harm Plaintiff through injury and loss to Plaintiff's business,

reputation, and consumer goodwill. Plaintiff has no adequate remedy at law to redress these injuries.

75. Plaintiff put Defendant on notice of Plaintiff's trademark rights and its claims against Defendant in a letter dated September 27, 2016.

76. Defendant responded to Plaintiff's September 27th letter in a letter dated October 13, 2016. In its letter, Defendant stated, *inter alia*, that "Microporous stands by its advertising and is not inclined to make changes to satisfy its competitors."

77. Plaintiff requested again, in a letter dated October 24, 2016, that Defendant discontinue its unlawful conduct and resolve Plaintiff's claims in a reasonable and business-like fashion.

78. Plaintiff and Defendant discussed this matter several times, including on December 9, 2016, but did not reach a resolution or make any forward progress toward a resolution.

79. Plaintiff sent a letter to Defendant on December 13, 2016, stating again that Defendant should investigate and amend the "previously sold as" statements on its website and any other promotional materials to make them accurate.

80. Defendant responded to the December 9th discussion and Plaintiff's December 13th letter in an email on December 18, 2016, proposing disclaimer language but did not agree to cease use of the DARAMIC Marks.

81. Plaintiff sent a letter to Defendant on December 28, 2016, proposing resolution of all issues and on Defendant's ceasing use of the DARAMIC Marks.

82. Defendant responded to Plaintiff's December 28th letter in a letter dated January 20, 2017. Defendant offered to cease using the "previously sold as" wording on its website, but refused to comply with the rest of Plaintiff's demands.

83. Plaintiff sent letters to Defendant dated January 23, 2017, and February 10, 2017, in response to Defendant's January 20th letter. Plaintiff made it clear that while part of Defendant's proposed course of action was acceptable, Defendant must also cease use of the DARAMIC Marks and post a disclaimer to try to remedy confusion.

84. In an email dated February 14, 2017, Defendant informed Plaintiff that it would not consider or agree to Plaintiff's reasonable requests, stating tersely "Microporous has nothing further to offer at this time."

85. Defendant has continuously refused to cease use of the DARAMIC Marks.

86. Despite full knowledge of Plaintiff's rights and assertions, Defendant has not changed its website to remove the false and misleading statements nor has Defendant stopped using the DARAMIC Marks.

87. Defendant has shown an unwarranted refusal to fully resolve the matter which constitutes the basis of Plaintiff's claims.

88. Defendant has refused to cease its unlawful conduct, has refused to resolve Plaintiff's claims in a reasonable and business-like fashion, and is continuing to violate Plaintiff's rights, as set forth herein.

COUNT I
TRADEMARK INFRINGEMENT – 15 U.S.C. § 1114

89. Plaintiff realleges and incorporates by reference the foregoing paragraphs.

90. Plaintiff owns valid and enforceable trademark rights in the DARAMIC mark, as reflected in U.S. Trademark Registration Nos. 925,419, 2,190,924 and 2,190,928, and has the exclusive right to use the DARAMIC mark in commerce in connection with battery separators.

91. Defendant has, without Plaintiff's consent, used in commerce the designation DARAMIC in a manner that is likely to cause confusion, or to cause mistake, or to deceive, in violation of 15 U.S.C. § 1114(1)(a).

92. As a result of Defendant's infringement, Plaintiff has suffered damages, including irreparable injury to its reputation and goodwill.

93. Plaintiff is entitled to monetary damages in an amount to be proven at trial, pursuant to 15 U.S.C. §§ 1117(a).

94. Upon information and belief, unless restrained and enjoined, Defendant will continue to infringe Plaintiff's rights in the DARAMIC mark.

95. Plaintiff's remedy at law is not adequate to redress the harm Defendant has caused and will continue to cause until its conduct is restrained, entitling Plaintiff to injunctive relief pursuant to 15 U.S.C. § 1116 and the equitable authority of this Court.

COUNT II
UNFAIR COMPETITION – 15 U.S.C. § 1125(a)

96. Plaintiff realleges and incorporates by reference the foregoing paragraphs.

97. Plaintiff owns valid and enforceable trademark rights in the DARAMIC Marks and has the exclusive right to use these marks in commerce in connection with battery separators.

98. Defendant's use of the DARAMIC Marks is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of Plaintiff with Defendant, or as to the origin, sponsorship, or approval of Defendant's battery separators by Plaintiff, in violation of 15 U.S.C. § 1125(a).

99. Defendant is competing unfairly with Plaintiff and is realizing unjust gains as a result of its unfair competition.

100. As a result of Defendant's unfair competition, Plaintiff has suffered damages, including lost goodwill.

101. Plaintiff is entitled to monetary damages in an amount to be proven at trial, pursuant to 15 U.S.C. §§ 1117(a).

102. Defendant's unfair competition, in violation of 15 U.S.C. § 1125(a), has caused irreparable injury to Plaintiff's reputation and goodwill. Upon information and belief, unless restrained and enjoined, Defendant will continue to infringe Plaintiff's rights in the DARAMIC Marks.

103. Plaintiff's remedy at law is not adequate to redress the harm Defendant has caused and will continue to cause until its conduct is restrained, entitling Plaintiff to injunctive relief pursuant to 15 U.S.C. § 1116 and the equitable authority of this Court.

COUNT III
FALSE ADVERTISING – 15 U.S.C. § 1125(a)

104. Plaintiff realleges and incorporates by reference the foregoing paragraphs.

105. Defendant's statements that "we continue to offer the broadest line of battery separators in the world" and "[n]o other battery separator manufacturer in the world offers as extensive a product line for almost every battery application" are false and misleading.

106. Defendant's statements that its battery separators were "previously sold as" Plaintiff's battery separators are false and misleading.

107. Defendant's statements that it "previously sold" Plaintiff's battery separators are false and misleading.

108. Defendant's statements, as set forth herein above, are likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of Defendant with Plaintiff, or as to the origin, sponsorship, control, or approval of Defendant's goods, services, or commercial activities by Plaintiff.

109. Defendant's statements, as set forth herein above, were made in commercial advertising or promotion.

110. Defendant's statements, as set forth herein above, misrepresent the nature, characteristics, or qualities of Defendant's or another person's goods, services, or commercial activities.

111. Defendant's statements, as set forth herein above, have led, and will continue to lead, to injury to Plaintiff's commercial interest in reputation and/or sales.

112. Upon information and belief, consumers looking to purchase battery separators are likely to withhold sales from Plaintiff because of Defendant's statements, as set forth herein above.

113. Upon information and belief, consumers have been, and will continue to be, misled about the nature, characteristics, or qualities of Plaintiff's business and its products by Defendant's statements, as set forth herein above.

114. Plaintiff's injuries have been proximately caused by Defendant's false and misleading statements in its commercial advertising or promotion.

115. Plaintiff has suffered, and unless Defendant is enjoined will continue to suffer, an economic or reputational injury flowing directly from Defendant's deception caused by its false advertising.

116. Plaintiff has suffered damages, including lost goodwill.

117. Plaintiff is entitled to monetary damages in an amount to be proven at trial, pursuant to 15 U.S.C. §§ 1117(a).

118. Defendant's false advertising, in violation of 15 U.S.C. § 1125, has caused irreparable injury to Plaintiff's reputation and goodwill. Upon information and belief, unless restrained and enjoined, Defendant will continue to harm Plaintiff through Defendant's false and misleading statements.

119. Plaintiff's remedy at law is not adequate to redress the harm Defendant has caused and will continue to cause until its conduct is restrained, entitling Plaintiff to injunctive relief pursuant to 15 U.S.C. § 1116 and the equitable authority of this Court.

COUNT IV
COMMON LAW TRADEMARK INFRINGEMENT

120. Plaintiff realleges and incorporates by reference the foregoing paragraphs.

121. Defendant's use of the DARAMIC Marks in connection with the manufacture, advertisement, offer for sale, sale, and distribution of battery separators in competition with Plaintiff is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of Defendant with Plaintiff, or as to the origin, sponsorship, or approval of Defendant's goods, services, or commercial activities by Plaintiff.

122. By using the DARAMIC Marks in connection with goods that are the same type as those offered by Plaintiff (namely, battery separators for lead acid batteries), in the same

channels of trade as those used by Plaintiff, Defendant is infringing Plaintiff's trademark rights in the DARAMIC Marks.

123. As a result of Defendant's infringement, Defendant has been unjustly enriched and Plaintiff has suffered damages, including lost sales, lost profits, and lost goodwill.

124. Defendant's infringement of Plaintiff's rights in the DARAMIC Marks has caused irreparable injury to Plaintiff's reputation and goodwill. Upon information and belief, unless restrained and enjoined, Defendant will continue to infringe Plaintiff's trademark rights.

125. Plaintiff's remedy at law is not adequate to redress the harm Defendant has caused and will continue to cause until its conduct is restrained.

126. Plaintiff is entitled to an accounting of profits and losses to compensate it for the damages caused by Defendant.

COUNT V
UNFAIR AND DECEPTIVE TRADE PRACTICES – N.C.G.S. § 75 *et seq.*

127. Plaintiff realleges and incorporates by reference the foregoing paragraphs.

128. Defendant's acts as alleged herein have been willful, reckless, wanton, egregious, unfair, unethical, deceptive, and unscrupulous.

129. Defendant's conduct, which is in or affecting commerce, constitutes unfair methods of competition and/or unfair and deceptive acts or practices, within the meaning of North Carolina General Statutes § 75-1.1 and North Carolina common law.

130. Plaintiff has been damaged by Defendant's conduct and is entitled to monetary and injunctive relief pursuant to North Carolina General Statutes § 75 *et seq*. and other applicable law, such relief includes an award of monetary damages, including the amount of the actual losses caused to Plaintiff by Defendant's unfair competition, lost profits, disgorgement of the unfair gains and other unjust enrichment benefiting Defendant, attorneys' fees and costs

pursuant to North Carolina General Statutes § 75-16.1, and treble damages pursuant to N.C. Gen. Stat. § 75-16, together with any and all amounts to be shown at trial.

COUNT VI
DECLARATORY JUDGMENT – 28 U.S.C. § 2201

131. Plaintiff realleges and incorporates by reference the foregoing paragraphs.

132. Defendant has accused Plaintiff of "a continuation of a disturbing pattern of Daramic raising baseless claims against Microporous in an apparent effort to distract its management and interfere with its ability to fairly compete with Daramic."

133. Defendant has threatened Plaintiff by stating that "Microporous reserves its right to take action on any such baseless claims."

134. Contrary to Defendant's accusations, Plaintiff has not raised baseless claims against Defendant in an effort to distract Defendant's management and interfere with Defendant's ability to fairly compete with Plaintiff.

135. Defendant has accused Plaintiff of publishing false and misleading statements on its website, and has stated that Defendant is "looking into false advertising claims against Daramic based on the foregoing."

136. Contrary to Defendant's accusations, Plaintiff has not made false or misleading statements, committed false advertising, or unfairly competed with Defendant.

137. On information and belief, Defendant is not entitled to any relief for any action or claims against Plaintiff.

138. There is an actual and substantial controversy between Plaintiff and Defendant of sufficient immediacy and reality to warrant the rendering of a declaratory judgment by this Court.

WHEREFORE, Plaintiff respectfully requests that the Court:

(A) Preliminarily and permanently enjoin Defendant, its affiliated entities, officers, agents, representatives, employees, and those persons acting in concert or participation with Defendant, from using any and all of the DARAMIC Marks, or any other mark, word, name, symbol, or slogan which is likely to cause confusion, mistake, or deception with respect to any and all of the DARAMIC Marks;

(B) Preliminarily and permanently enjoin Defendant, its affiliated entities, officers, agents, representatives, employees, and those persons acting in concert or participation with Defendant, from false advertising in conjunction with its battery separator business;

(C) Order Defendant to pay all actual damages suffered by Plaintiff as a result of Defendant's unlawful activities;

(D) Order Defendant to disgorge all profits attributable to Defendant's unlawful activities;

(E) Grant Plaintiff a monetary award to account for Defendant's unlawful conduct;

(F) Order an accounting of Defendant's profits;

(G) Grant Plaintiff treble damages and attorneys' fees, due to the willful, reckless, wanton, egregious, unfair, unethical, deceptive and unscrupulous conduct of Defendant;

(H) Declare that Plaintiff is not liable to Defendant for any claims;

(I) Order that Defendant pay the costs of this action;

(J) Grant Plaintiff pre-judgment and post-judgment interest; and

(K) Grant such other and further relief as this Court deems just and equitable.

Plaintiff hereby demands a trial by jury on all issues so triable.

Date: February 17, 2017

Respectfully submitted,

s/ J. Mark Wilson
J. Mark Wilson
NC State Bar No. 25763
MOORE & VAN ALLEN PLLC
Suite 4700
100 North Tryon Street
Charlotte, NC 28202-4003
Telephone (704) 331-1000
Facsimile (704) 339-5981
Email: markwilson@mvalaw.com

Attorneys for Plaintiff Daramic, LLC